

OFFICE OF THE ATTORNEY GENERAL 91-00187



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Honorable Bill J. Dukes
Mayor, City of Decatur
402 Lee Street, N.E.
Decatur, Alabama 35602

Solid Waste - Municipalities -
Solid Waste Disposal - Recycling
Program

- 1) A three-year contract for the collection, sorting and marketing of recyclable materials, with an option to renew for an additional two years, violates the provisions of the Alabama Competitive Bid Law, Code of Alabama 1975, §41-16-50, et seq.
- 2) Whether a contract for three years, with an option to renew for two years, constitutes impermissible variation from the request for proposals which solicited a contract for a minimum of a five-year period is a question which need not be addressed by this opinion.

Dear Mayor Dukes:

This opinion is issued in response to your request for an opinion from the Attorney General.

QUESTION 1

Would a three-year contract with an option to renew for an additional two years between the City of Decatur and Browning-Ferris Industries of Alabama, Inc. ("BFI") violate the provisions of the Alabama Competitive Bid Law, Code of Alabama 1975, §41-16-50, et seq.?

FACTS AND ANALYSIS

Your request presents the following additional facts:

On October 19, 1990, the City of Decatur issued a request for proposals for a city-wide curbside recycling program, and responses to the request were opened on November 14, 1990. Upon recommendation of a committee appointed to evaluate the proposals, the Decatur City Council determined that BFI was the lowest responsible bidder. The City of Decatur specifically solicited proposals for a "city-wide curbside recycling program to be conducted for a minimum of a five year period." In view of the three-year limitation period imposed by the competitive bid law on the letting of public contracts, BFI has proposed to the City of Decatur that both parties enter into a contract in accordance with the proposals submitted by BFI for a period of three years, with an option to renew for an additional two years.

A copy of the City of Decatur's request for proposals was attached to your request for an opinion. The request for proposals described the services to be performed by the selected contractor as "collection, sorting and marketing services in support of a city-wide curbside recycling program." The specifications contained in the request for proposals indicated that the items to be collected from the

curbside will consist of separated recyclable materials, including glass, aluminum and steel cans, plastic milk jugs and plastic two liter bottles and newsprint. The selected contractor will transport these materials to a central processing site and retain responsibility for brokering of these materials to their respective markets.

Code of Alabama 1975, §41-16-51(a) exempts from competitive bidding requirements certain contracts between municipalities and those providing solid waste collection and disposal services. This act provides, among other things, that:

" . . . the competitive bidding requirements of this article shall not apply to:

"(10) Existing contracts up for renewal for sanitation or solid waste collection and disposal between municipalities and/or counties, and those providing services."

A proposed contract for a period of three years, with an option to renew for an additional two years, does not violate the competitive bid law, Code of Alabama 1975, §41-16-50, provided that the contract is for "solid waste collection and disposal." It is the opinion of this office, however, that based upon the information provided in your request, the services to be performed pursuant to your request for proposals do not involve "solid waste" or "disposal." Therefore, the contract may not exceed a term of three years without violating Code of Alabama 1975, §41-16-57(e), which states, ". . . contracts for the purchase of contractual services shall be let for periods of not greater than three years." The reasons for this opinion are discussed below.

The competitive bid law exception pertaining to solid waste collection and disposal services was enacted on May 4, 1982, and was discussed by the Supreme Court of Alabama in Maintenance Inc. v. Houston City, 438 So.2d 741 (Ala. 1983). In that case, the Court held that a four-year contract for solid waste collection and disposal, executed prior to the enactment of the 1982 amendment, was not exempt from the competitive bid requirements. The Court ruled that the contract was void as a matter of law under Code of Alabama 1975, §41-16-57(e). This case, while underscoring the consequences of violating the competitive bid law, does not directly address the issue of whether the 1982 amendment to the competitive bid law covers the type of curbside recycling services sought by the City of Decatur.

The important terms used in the 1982 competitive bid law exemption, such as the terms "solid waste" and "disposal," are not defined in the competitive bid law. Therefore, in order to determine the intended scope of the exemption, it is necessary to examine other Alabama statutes and regulations promulgated thereunder.

"Solid waste" is defined by the Solid Waste Disposal Act and regulations promulgated thereunder as:

" . . . all putrescible and nonputrescible discarded materials, except household sewage and livestock and poultry wastes, including, but not limited to, garbage, rubbish, ashes, street and highway cleanings, dead animals, including offal, abandoned automobiles and such industrial wastes are not controlled by other agencies."

Code of Alabama 1975, §22-27-2. In order for a material to be a "solid waste" under the Solid Waste Disposal Act, it must first be classified as a "discarded material."

"Discarded material" is defined under regulations issued by the Alabama Department of Environmental Management (ADEM) as "material thrown away, abandoned, disposed of or otherwise given up without intent to reuse or reclaim." See ADEM Administrative Code R. 335-13-1-.03 (emphasis added). Thus, ADEM's definition of "discarded materials" specifically excludes materials that are thrown away, abandoned, disposed of, or otherwise given up with the intent to reuse or reclaim.

Recyclable materials separated from garbage and rubbish by residents and placed in separate containers at the curbside for collection and recycling are not "solid waste" because such materials are not "discarded," but are instead diverted from the waste stream for reuse or recycling.

Regulations issued by ADEM pursuant to the Solid Waste Disposal Act further define "disposal" as "the discharge, deposit, injection, dumping, spilling, leaking or placing solid waste into or on any land or water so that such waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters." See ADEM Administrative Code R. 335-13-1-.03. Under this definition, the term "disposal" pertains to "solid waste," not to recyclable materials that are diverted from the waste stream prior to collection.

Several recent court decisions have construed the term "disposal" under two federal laws that contain virtually the identical definition of "disposal" as is contained in ADEM's regulations. These cases hold that under the federal laws the term "disposal" means the affirmative act of discarding a substance as a waste, and not to the productive use, reuse or recycling of the substance. See, e.g., 3550 Stevens Creek Association v. Barclays Bank of California, 915 F.2d 1355 (9th Cir. 1990) (the placement of asbestos in the structure of a building does not constitute disposal); Jersey City Redevelopment Auth. v. PPG Indus., 655 F.Supp. 1257, 1260-61 (D.C.N.J. 1987), aff'd, 866 F.2d 1411 (3rd Cir. 1988) (transaction involving transfer of hazardous substance is not "disposal" if it involved the sale of a product); Edward Hines Lumber Co. v. Vulcan Materials Co., 685 F.Supp. 651, 654 (N.D.Ill. 1988), aff'd, 861 F.2d 155 (7th Cir. 1988) (sale of hazardous substance for use in wood treatment process does not constitute arranging disposal).

Based upon the above analysis, it is the opinion of this office that recyclable materials placed on the curbside in separate containers from garbage and rubbish and destined for collection and recycling are not "discarded materials" or "solid waste," and that the sorting, marketing and recycling of such materials does not constitute "disposal" for purposes of the Alabama Competitive Bid Law, Solid Waste Disposal Act or the regulations promulgated thereunder.

This opinion is intended to further the objectives of the competitive bid law and promote strong and effective recycling programs by keeping recycling contracts subject to the competitive bid laws in the absence of a clearly expressed legislative exception for such recycling contracts.

CONCLUSION

It is the opinion of this office that a three-year contract for the collection, sorting and marketing of recyclable materials, with an option to renew for an additional two years, violates the provision of the Alabama Competitive Bid Law, Code of Alabama 1975, §41-16-50, et seq. The exemption to the competitive bid law for solid waste collection and disposal does not apply to such a contract because recyclable materials placed on the curbside in separate containers from garbage and rubbish and destined for collection and recycling are not "discarded materials" or "solid waste." In addition, the sorting, marketing and recycling of such materials does not constitute "disposal" for purposes of the competitive bid law.

QUESTION 2

Does a contract for three years, with an option to renew for two years, constitute an impermissible variation from the request for proposals which solicited a contract for a minimum of a five-year period?

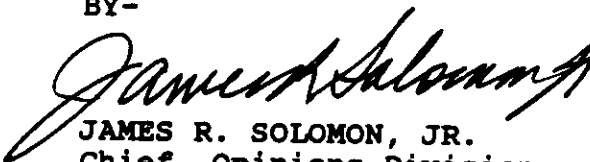
CONCLUSION

In view of the opinion of this office on Question 1, it is unnecessary to issue an opinion on Question 2.

I hope this sufficiently answers your questions. If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

JIMMY EVANS
ATTORNEY GENERAL
BY-


JAMES R. SOLOMON, JR.
Chief, Opinions Division

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